Mohd Najib bin Sulaiman v Sulaiman bin Hj Mohd Yusof (sued in his capacity as Deputy Director, Commercial Crimes Investigation Department) & Ors

HIGH COURT (KUALA LUMPUR) — NO S1–21–198 OF 2002
VARGHESE GEORGE JC
30 SEPTEMBER 2010

Labour Law — Employment — Termination — Decision to terminate services of Chief Inspector — Whether termination unconstitutional, void and of no effect in law — Whether charges vague and lacking in particulars — Whether plaintiff denied fair hearing — Whether material information contained in documents had not been extended to plaintiff — Whether second defendant should have referred case to committee of investigation — Whether punishment of dismissal excessive or severe — Whether action commenced by correct mode — Public Officers (Conduct and Discipline) Regulation 1993 reg 28 — Rules of the High Court 1980 O 53

The plaintiff, a chief inspector with Polis Di Raja Malaysia ('the third defendant') was dismissed from service as of 19 April 2000. By way of a letter dated 14 August 1999, the plaintiff was requested to submit a written representation to exculpate himself of four charges of soliciting a bribe for a corrupt purpose. The plaintiff addressed all the charges in detail in his written representations dated 1 September 1999. After having considered the written representations of the plaintiff, the Ketua Police Negara Malaysia ('the second defendant') went on to decide that the explanations rendered by the plaintiff did not exculpate him of charges numbers 1,2 and 3 and then invited the plaintiff to make a plea in mitigation before punishment was imposed. The plaintiff proceeded to submit his mitigation by way of a letter dated 23 November 1999. Thereafter the second defendant made the decision to terminate the plaintiff's services with the third defendant. This writ of summons action instituted by the plaintiff was for a declaration that the termination of his services with the third defendant was unconstitutional, void and of no effect in law. By way of this action the plaintiff sought from this court an order that he be reinstated to his former position with all salary, allowances and/or privileges and also for special, general, exemplary and punitive damages to be paid by the defendants. It was the plaintiff's case that the charges brought against him were vague in that they lacked adequate details or particulars; that he was denied a fair hearing in that all the evidence against him was not made known to him for him to make a full and adequate representation; and that the second defendant should have established a committee of investigation(CI) pursuant to reg 28(4) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations') to enable him to adduce oral evidence to

explain the charges against him. The plaintiff contended that the punishment of dismissal meted out to him was excessive or severe and ought to be set aside by this court. The defendants submitted that the plaintiff's action should be dismissed because it was brought by way of a writ action instead of as a judicial review proceeding pursuant to O 53 of the Rules of the High Court 1980 ('RHC'). A B

Held, dismissing the action with costs fixed at RM7,500:

(1) Since the instant case had proceeded up to the stage of the full trial as a writ action without objection, the defendants should not raise the issue that the proceedings should be by way of O 53 of the RHC, at the close of the trial. It would not have been fair and just to the plaintiff to deny consideration of the plaintiff's claims at that stage on a rather 'technical' ground. In any case, irrespective of whether the proceedings were commenced by writ or judicial review, in proceedings of this nature the court had only a limited supervisory role, namely to ascertain that the concept of natural justice and procedural fairness had been fulfilled and that there had been strict compliance with statutory prescriptions in the proceedings leading to the plaintiff's dismissal (see paras 4–6). C D

(2) It was found that the plaintiff's submission that the charges were vague and lacked particulars could not stand. The fact that the plaintiff was able to address all the charges in detail in his written representations showed that the letter of 14 August 1999, which set out the four charges against the plaintiff, could not have been vague or lacking in particulars. The breaches of discipline committed by the plaintiff were fully identified and discernible from the contents of the charges (see paras 11–13). E F

(3) There was no obligation on the second defendant as the Disciplinary Authority ('the DA') to extend all the documents referred to or relied upon unless the person charged specifically requests for these documents. As such, the plaintiff could not complain that material information contained in documents, based on which the charges were framed, had not been extended to the plaintiff. Further, the letter of 14 August 1999 requesting the plaintiff's written representations referred to a 'laporan' but the plaintiff did not request to be given a copy of this 'laporan' or any other documents before submitting his written representations. In any case, from the substantive written representations of the plaintiff it was clear that the non-production of the 'laporan' or other documents referred to by the plaintiff had not deprived him of the opportunity to fully answer the charges brought against him (see paras 14–16 & 18). G H I

(4) The decision as to whether to constitute a CI is a matter left to the absolute discretion of the DA, the second defendant, after having given due consideration to the explanations by the plaintiff. This court, which only has a 'supervisory function' as to whether the decision making process had followed the procedure laid down, was not required to go into the merits of the decision unless fraud or mala fide was shown. There was no evidence led by the plaintiff of any mala fide on the part of the second defendant in coming to his decision not to constitute a CI (see paras 20–22).

(5) Only the decision making process and not the decision on punishment was subject to scrutiny by this court. Based on decided cases the issue of punishment was left to the DA to decide on in the context of each case (see para 24).

(6) The fact that the plaintiff was not charged with any criminal offence was irrelevant to the issues at hand before this court (see para 26).

[Bahasa Malaysia summary

Plaintif, seorang ketua inspektor dengan Polis Di Raja Malaysia ('defendan ketiga') telah dipecat daripada perkhidmatan semenjak 19 April 2000. Melalui surat bertarikh 14 Ogos 1999, plaintif diminta mengemukakan rujukan bertulis untuk melepaskan dirinya terhadap empat pertuduhan meminta suapan sebagai rasuah. Plaintif menjawab kesemua pertuduhan dengan terperinci di dalam representasi bertulisnya yang bertarikh 1 September 1999. Selepas mempertimbangkan representasi bertulis plaintif, Ketua Polis Negara Malaysia ('defendan kedua') memutuskan bahawa penjelasan yang diberikan oleh plaintif tidak membebaskan dirinya daripada pertuduhan pertama, kedua dan ketiga dan kemudian meminta plaintif untuk memasukkan pli pengurangan sebelum hukuman dikenakan. Plaintif meneruskan untuk mengemukakan pengurangan melalui surat yang bertarikh 23 November 1999. Kemudian, defendan kedua membuat keputusan untuk menamatkan perkhidmatan plaintif dengan defendan ketiga. Tindakan writ saman ini yang dimulakan oleh plaintif adalah untuk deklarasi bahawa penamatan perkhidmatannya dengan defendan ketiga adalah tidak berperlembagaan, batal dan tidak mempunyai kesan dari segi undang-undang. Melalui tindakan ini, plaintif memohon daripada mahkamah ini satu perintah bahawa dia dikembalikan semula ke jawatan asalnya dengan kesemua gaji, elaun dan/atau keistimewaan dan juga untuk ganti rugi khas, am, teladan dan punitif dibayar oleh defendan-defendan. Adalah kes plaintif bahawa pertuduhan yang dibawa terhadapnya tidak jelas di mana ia tidak mempunyai butir-butir atau maklumat yang mencukupi; bahawa dia dinafikan perbicaraan yang adil di mana kesemua keterangan terhadapnya tidak diberitahu kepadanya untuk dia membuat rujukan yang lengkap dan secukupnya; dan bahawa defendan kedua sepatutnya menubuhkan jawatankuasa penyiasatan ('JP') berikutan peraturan 28(4) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993

('Peraturan') untuk membolehkannya mengemukakan keterangan lisan untuk menjelaskan pertuduhan terhadapnya. Plaintif menghujah bahawa hukuman penamatan yang dikenakan ke atasnya adalah berlebihan atau teruk dan sepatutnya diketepikan oleh mahkamah ini. Defendan-defendan menghujah bahawa tindakan plaintif sepatutnya ditolak kerana ia dibuat secara tindakan writ dan bukan sebagai prosiding semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak tindakan dengan kos:

(1) Oleh kerana kes ini telah berlanjutan sehingga ke peringkat perbicaraan penuh sebagai tindakan writ tanpa bantahan, defendan-defendan tidak sepatutnya membangkitkan isu bahawa prosiding sepatutnya dibuat melalui A 53 KMT, pada penutupan perbicaraan. Ia tidak akan menjadi adil dan saksama kepada plaintif untuk dinafikan pertimbangan tuntutan-tuntutannya pada peringkat tersebut atas alasan teknikal. Walau bagaimanapun, tidak kira sama ada prosiding telah dimulakan secara writ atau semakan kehakiman, di dalam prosiding yang bersifat begini mahkamah hanya mempunyai peranan penyeliaan yang terhad. Iaitu untuk menentukan bahawa konsep keadilan semulajadi dan keadilan prosedur telah dipenuhi dan terdapat pematuhan ketat preskripsi statutori di dalam prosiding yang membawa kepada penamatan plaintif (lihat perenggan 4–6).

(2) Didapati bahawa hujahan plaintif bahawa pertuduhan-pertuduhan tersebut tidak jelas dan kekurangan butir-butir tidak boleh dipertahankan. Fakta bahawa plaintif boleh menjawab kesemua pertuduhan dengan jelas di dalam representasi bertulisnya menunjukkan bahawa surat bertarikh 14 Ogos 199, yang mengemukakan empat pertuduhan terhadap plaintif, tidak boleh menjadi tidak jelas atau kekurangan butiran. Salah laku disiplin yang dilakukan oleh plaintif dikenal pasti dengan menyeluruh dan ditanggap daripada kandungan pertuduhan-pertuduhan tersebut (lihat perenggan 11–13).

(3) Tidak ada kewajipan atas defendan sebagai pihak berkuasa disiplin (PBD) untuk memberikan kesemua dokumen yang dirujuk atau disandarkan kecuali pihak yang dituduh meminta secara spesifik dokumen-dokumen ini. Oleh itu, plaintif tidak boleh mengadu bahawa maklumat material yang terkandung di dalam dokumen-dokumen, berasaskan kepada pertuduhan yang dikenakan, tidak diberikan kepada plaintif. Selanjutnya, surat yang bertarikh 14 Ogos 1999 meminta representasi bertulis plaintif yang merujuk kepada 'laporan' tetapi plaintif tidak meminta untuk diberikan satu salinan laporan ini atau apa-apa dokumen lain sebelum mengemukakan representasi bertulisnya. Walau bagaimanapun, daripada representasi bertulis substantif plaintif, jelas bahawa kegagalan mengemukakan laporan atau

dokumen-dokumen lain yang dirujuk oleh plaintif tidak mematahkan peluangnya untuk menjawab sepenuhnya pertuduhan-pertuduhan terhadapnya (lihat perenggan 14–16 & 18).

(4) Keputusan sama ada untuk menubuhkan JP adalah perkara yang ditinggalkan kepada budi bicara mutlak PBD, defendan kedua, selepas memberikan pertimbangan yang sewajarnya kepada penjelasan oleh plaintif. Mahkamah ini yang mempunyai hanya 'supervisory function' sama ada proses membuat keputusan telah dibuat mengikut prosedur yang ditetapkan, tidak perlu melihat merit keputusan tersebut kecuali fraud atau mala fide ditunjukkan. Tidak ada keterangan yang dikemukakan oleh plaintif tentang apa-apa mala fide oleh defendan kedua dalam membuat keputusannya untuk tidak menubuhkan JP (lihat perenggan 20–22).

(5) Hanya proses membuat keputusan dan bukannya keputusan atas hukuman yang tertakluk kepada penelitian oleh mahkamah ini. Berdasarkan kes-kes yang telah diputuskan isu hukuman dibiarkan kepada JP untuk memutuskannya bergantung atas konteks setiap kes (lihat perenggan 24).

(6) Fakta bahawa plaintif tidak dituduh dengan apa-apa kesalahan jenayah tidak relevan kepada isu di sini di hadapan mahkamah (lihat perenggan 26).]

Notes

For cases on termination, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1198–1204.

Cases referred to

Abdul Aziz bin Mohd Alias lwn Timbalan Ketua Polis Negara Malaysia & Anor [2009] 1 MLJ 137; [2010] 3 CLJ 643, CA (refd)

Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary)) [2010] 3 MLJ 753, CA (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors 773 [2008] 5 MLJ 773, CA (refd)

Chai Kok Choi v Ketua Polis Negara & Ors [2008] 1 MLJ 725; [2008] 1 AMR 93, FC (refd)

Ganasan a/l Marimuthu v Public Services Commission & Anor [1998] 4 MLJ 280; [1998] 4 CLJ 331, CA

Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor [2010] 6 MLJ 441, FC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)

Mat Ghaffar bin Baba v Ketua Polis Negara & Anor [2008] 2 MLJ 1; [2008] 1 CLJ 773, CA (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308; [1995] 1 AMR 855, CA (refd)
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 135 (refd)
Zulkifli bin Hashim v Officer in Charge of Police District, Barat Daya & Ors & another appeal [2010] 2 MLJ 616 (refd)

Legislation referred to

Public Officers (Conduct and Discipline) Regulation 1993 regs 28, 28(1), (3), (4)
Rules of the High Court 1980 O 53

Rudeen Chua Kim Hong (Rajendran & Deen) for the plaintiff.
Shamsul bin Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Varghese George JC:

[1] This action was brought by the plaintiff by way of a writ of summons for a declaration that the termination of his services as a Chief Inspector with PDRM (third defendant) was unconstitutional, void and of no effect in law. The plaintiff also sought from this court an order that he be reinstated to his former position with all salary, allowances and/or privileges together with promotions in the meanwhile due to him, and also for special, general, exemplary and punitive damages to be paid by the defendants.

[2] After having given due consideration to the oral and documentary evidence led at the trial before me, the written submissions of respective counsel and the many decided authorities pertaining to the law and issues related with the dismissal of police personnel or public servants which were cited to me, I found no reason to interfere with the decision of second defendant (the Ketua Polis Negara), to terminate the plaintiff's services with PDRM (third defendant) as of 19 April 2000. Accordingly on 9 July 2010 I dismissed the plaintiff's action and awarded cost to the defendants.

[3] I also did on that day read out the broad grounds for my decision and reserved the right to issue a more complete decision, should there be an appeal. I now set out the full grounds for my decision.

[4] As noted above, the action before me was by way of a writ action. It was not a judicial review proceedings pursuant to O 53 of the Rules of the High Court 1980.

The question of law posed to the Federal Court for determination recently in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773, which involved the dismissal of a government officer attached to Ministry of Culture Arts and Tourism, included — whether it was an abuse of the process of the court to commence the proceedings by way of a writ and a statement of claim to challenge the decision of a public authority instead of filing an application for judicial review under O 53 of the RHC 1980 thereby evading the clear requirement of O 53 of the RHC 1980.

James Foong FCJ in delivering the judgment of Court stated:

> [61] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O 53 RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering O 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.
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> ...
>
> [63] As to the second question, we are of the firm conviction that the appellant's claim for infringement of his rights by the respondents is based solely on public law. There is no trace of private law involvement nor do the circumstances justify it to be an exception to the general rule. For this, we agree with the courts below that the appellant's writ should be struck off as an abuse of the court's process.

This strong and clear enunciation of the law, which I accept to be the correct position, was brought to my attention at the close of the trial. Although this position in law was urged upon me by the SFC for the defendants, I must for the record state that I did not dismiss this action just because it was brought by way of a writ action and not as a judicial review proceedings pursuant to O 53 of the RHC 1980. This matter had proceeded all along as a writ action up to the stage of the full trial without objection by the defendants. It would not have been fair and just to the plaintiff to deny consideration of the plaintiff's claims at that stage on a rather 'technical' ground.

[5] Be that as it may, irrespective of whether by writ or judicial review, it has been repeatedly affirmed that this court in proceedings of this nature has only a limited supervisory role, namely, to ascertain that the concept of natural justice and procedural fairness had been fulfilled and there has been strict compliance with statutory prescriptions in the proceedings leading to the plaintiff's dismissal. This court is not required to embark upon an evaluation of evidence before the disciplinary authority or the merits of the case against the plaintiff by analysing the relative probative force or of the sufficiency of such evidence placed before the disciplinary authority.

[6] There was no dispute that disciplinary proceedings of police officers was governed by the Public Officers (Conduct and Discipline) Regulations 1993, and that second defendant (Ketua Polis Negara) by himself alone at the material time constituted the relevant disciplinary authority.

[7] It was also not in dispute that procedures applicable in cases where the alleged breach of conduct is considered to warrant a dismissal or reduction in rank was *reg 28* thereof nor was there any dispute of the fact that the first defendant exercised his functions, duties and responsibilities as instructed by and on behalf of the second defendant (Ketua Polis Negara) in respect of disciplinary matters as empowered by the Instrument of Delegation of Certain Functions, Powers, Duties and Responsibilities (PU(B)621/1985).

[8] The plaintiff's case essentially was that the procedures and safeguards enshrined in reg 28 had not been complied with and that plaintiff had not been afforded a fair and reasonable opportunity of being heard on the charges leveled against him. The thrust of the plaintiffs arguments were threefold in my assessment:

(a) That the charges brought against plaintiff were vague since adequate details or particulars were not set out;

(b) Material information or documents that had been admittedly referred or relied upon by second defendant (Ketua Polis Negara) in coming to a 'prima facie' decision and subsequently in considering plaintiffs

representation had not been extended to plaintiff and accordingly plaintiff was denied a fair hearing as all evidence that was/or were against him were not made known to him for him to make in any event a full and adequate representation.

(c) Arising from the written representation submitted by the plaintiff, the second defendant (Ketua Polis Negara) should have established a Committee of Investigation pursuant to reg 28(4) to enable the plaintiff to adduce oral evidence to explain away the charges against him.

[9] Regulation 28(1), reg 28(3) and reg 28(4) in so far as are relevant for the purposes of this grounds of decision are reproduced here:

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(1) The appropriate Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a prime facie case against the officer for dismissal or reduction in rank, the appropriate Disciplinary Authority shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge.

...

(3) If the officer does not furnish any representation within the period specified in subregulation (1), or if the officer furnishes a representation which does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(4) Where the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may appoint a Committee of Investigation comprising not less than two government officers who are senior to the officer under investigation.

[10] Counsel for the plaintiff rightfully conceded that the 'right to be heard' in administrative law does not necessarily mean a right of 'oral hearing' always and that within the scheme of reg 28 the right to adduce any oral evidence is only available if a Committee of Investigation pursuant to reg 28(4) is set up, that is, 'where the Disciplinary Authority' (in this case the second defendant) was of the opinion that further clarification was required.

CHARGES

Written representation

[11] Were then the four charges set out in the letter of 14 August 1999, wherein the plaintiff was requested to submit a written representation to exculpate himself, vague or lacking in sufficient detail or particulars so much so that the plaintiff could not make an adequate representation in respect of each of the charges?

I have read and reread the said letter of 14 August 1999 and also the plaintiff's written representation dated 1 September 1999 in response. It must be highlighted here that the lengthy written representation submitted by the plaintiff was set out in six typed-pages with eight *lampiran* (attachments) as supporting documents (pp 18–23 of the '*ikatan dokumen tambahan*').

I could not, from my examination of contents of the said two documents, find any reason to agree with the plaintiff's contention that the charges were vague or that they did not set out sufficient and relevant details and particulars to enable the plaintiff to make a considered and studied representation. It did not appear to me that the charges lacked details or precision as to what the plaintiff was required to respond to and indeed the plaintiff did address those charges.

[12] Each of the charges ought to be separately read in the context of the matters complained therein. In respect of the *first charge* although time or location were not set out therein, the material dates during which the alleged solicitation of the specified RM50,000 as a bribe for a corrupt purpose, which is also identified, is fully set out. The context and focus of the charge here is the soliciting of a bribe for a corrupt purpose and in my view the providing of the dates — 8 June 1999 to 10 June 1999 — as the period during which this was alleged to have taken place, amounted to sufficient particulars for the plaintiff to address his mind and make his response to that charge.

There was no doubt in my mind at all as well, that in respect of all the other three charges there was similarly provided to the plaintiff sufficient details and particulars of the circumstances underlying the charges brought against him.

This was borne out by the fact that the plaintiff addressed all the charges in detail in the written representations he subsequently made in response.

[13] The charges were therefore not vague. I do not find any merit in the plaintiff's suggestion that they were confusing or misleading either. The breaches of discipline allegedly committed by the plaintiff was fully identified and also discernible from the contents of the charges.

[14] The other related issue raised by the plaintiff in respect of the proceedings at this stage was that material information contained in some other

documents, based on which the charges were framed, had not been extended to the plaintiff together with the charges. Decided case authorities of our superior courts on this point, to which I am bound, are clearly to the effect that there was no obligation on the disciplinary authority (here the second defendant) to extend all such documents referred or relied upon unless it had been specifically requested for by the person charged.

The Federal Court in *Chai Kok Choi v Ketua Polis Negara & Ors* [2008] 1 MLJ 725; [2008] 1 AMR 93 affirmed the Court of Appeal decision there in that case in the following terms:'... there is no added duty on the disciplinary authority to provide documents without any request being made by the offending officer.' (See also Court of Appeal in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; [1995] 1 AMR 855. Contrast this with *Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [2008] 2 MLJ 1; [2008] 1 CLJ 773 where there was a specific request for documents but which was not provided to the officer concerned).

The plaintiff here in this instant case under cross-examination admitted that he did not request for such documents at all. His explanation was that he did not know the law. Ignorance of the law especially by a public servant, who is governed by specific procedure as to his tenure or terms of his service, is not an excuse that can be accepted. *(Abdul Aziz bin Mohd Alias lwn Timbalan Ketua Polis Negara Malaysia & Anor* [2009] 1 MLJ 137; [2010] 3 CLJ 643).

[15] I also need to highlight here that in the letter of 14 August 1999 ie the letter to the plaintiff requesting the plaintiff's written representation on the four charges, the opening paragraph expressly refers to a *laporan*. It is as follows:

> Saya diarah oleh Ketua Polis Negara memaklumkan anda bahawa satu laporan telah diterima oleh pihak berkuasa tatatertib...

and further in para 2 it is further expressed:

> ... setelah menimbangkan *laporan* itu....

It was therefore clear that the plaintiff had been given notice of this document and that the second defendant's decision to issue the charges against him was in reliance of the same. Yet, it is significant and noteworthy that the plaintiff did not request at all to be given a copy of the same before submitting his written representation. This could only mean that the plaintiff was satisfied with the details furnished of the charges against him. He well knew of the existence of the 'laporan' but did not ask to see a copy of the same.

[16] I have read again through the rather substantive written representations of the plaintiff dated 1 September 1999 and from the tenor and extent of the matters covered therein by the plaintiff, I do not agree that the non-production of any of the following (as argued by counsel for the plaintiff), namely:

(a) *borang maklumat* (in evidence at pages 5 and 6 of the IDT);

(b) *the laporan* — part of which marked as 'D4' was in evidence at pp 7 and 8 of the IDT);

(c) *kertas siasatan lengkap*; and

(d) *dokumen-dokumen lain*;

to the plaintiff before the written representation was submitted had deprived the plaintiff of the opportunity to fully answer the charges or had in any way prejudiced the plaintiff in answering the charges brought against him.

[17] Regulation 28(1) only required a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer was to be dismissed or reduced in rank to be sent to the officer.

[18] The point remains, the plaintiff did not request for such documents and there does not in law arise any obligation on the second defendant (Ketua Polis Negara) to extend such documents as a matter of right, to the plaintiff.

MITIGATION

Committee of investigation.

[19] After having considered the written representation of the plaintiff dated 1 September 1999, the second defendant went on to make a decision to the effect that the explanations rendered by the plaintiff therein did not exculpate the plaintiff of charges Nos. 1, 2, and 3. The plaintiff was informed of the said decision by letter of 28 October 1999 and the plaintiff was then invited to make a plea in mitigation before punishment was imposed.

The plaintiff proceeded to submit his 'rayuan' (mitigation) by way of a letter dated 23 November 1999.

[20] To be noted here, firstly, was that the plaintiff did not, if he was dissatisfied with the conclusion reached by the second defendant (Ketua Polis Negara) request at this stage for a committee of investigation to be set up on any aspect of the fact or surrounding circumstances that were disputed by him and raised in his written representation.

Secondly, reg 28(4) clearly sets out that a committee of investigation is only set up if the disciplinary authority is of the opinion that the case against the officer requires further clarification after considering the representations made by the alleged offender. This court cannot question this prerogative left to the disciplinary authority. There was no evidence led by the plaintiff of any mala

fide on the part of the second defendant (Ketua Polis Negara) in coming to this decision not to constitute a 'committee of investigation'.

[21] In *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573 it was emphatically held by the Federal Court that only when the disciplinary authority considers that the case against the officer requires further clarification need the disciplinary authority appoint a 'committee of inquiry' (as it was termed in that case). It was purely for the disciplinary authority and not for the officer concerned or for the court to so decide, the court there ruled.

[22] Zaki Tun Azmi (PCA then) delivering the judgment of the Federal Court reaffirmed the relevant principle as follows:

> ... the decision whether to refer a case to a committee of inquiry is the discretion of the disciplinary authority. In so deciding whether to refer to the committee of enquiry, the disciplinary authority would have to consider the written representation of the respondent ie. whether his written representation exculpated him from the charges preferred against him.
>
> From these [GOs], it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself.

Whether to constitute a committee of investigation is a matter left to the absolute discretion of the disciplinary authority (the second defendant) after having given due consideration to the the explanations and whether the version of the events given by the plaintiff was convincing enough to exculpate the plaintiff from the charges. It is further observed in the same case of *Vickneswary* above:

> From the provisions of the [general orders] it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the [respondent] to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.

[22] This court, as earlier stated, has only a 'supervisory function' as to whether the decision making process has followed the procedure laid down and is not required to go into the merits of such decision unless fraud or 'mala fide' is shown.

The Court of Appeal in an earlier case *Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280; [1998] 4 CLJ 331 had also on the same point held as follows:

> ...it is only when the disciplinary authority deems it necessary to appoint, and does appoint a committee of inquiry under the [General Orders] does a person have the opportunity of giving oral testimony to exculpate himself. There the matter stopped at the disciplinary authority stage where [general order 26(4)] was applicable.... 'a fair hearing' does not mean that there must be an opportunity to be heard orally; but opportunity offered to make the written representation is sufficient to meet the demands of fairness.

PUNISHMENT

[23] There is also a somewhat diagonal argument taken by counsel for plaintiff in his closing submissions as to the reasonableness of the punishment of dismissal meted out to the plaintiff in this case. Counsel contended that it was excessive or severe and ought to be interfered by this court, if not set aside completely.

[24] In *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 the Federal Court per Peh Swee Chin FCJ in very clear language stated as follows:

> It cannot be denied further that the disciplining of a public officer by his department head, is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even through the judiciary is that judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.
>
> Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.
>
> The Federal Court there in the above case disagreed with the majority view of the Court of Appeal in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 135 and in endorsing the dissenting judgment (in the Court of Appeal) there, went on to affirm the principle that whether dismissal or a lesser penalty (like a reduction in rank) was appropriate was not for the court to say. In other words, the court should not substitute its own view as to what is the appropriate penalty.

[24] It is my considered view, based on that authority of our highest court and other decided cases in this area, that this court should not also go into the issue of punishment, namely, whether it was fair or excessive. That has been left to the disciplinary authority to decide in the context of each case. Only the decision making process is subject to scrutiny by this court and not a review as to the decision on punishment.

The comments of Justice Hishamuddin Yunus J in the Court of Appeal decision in *Zulkifli bin Hashim v Officer in Charge of Police District, Barat Daya & Ors and another appeal* [2010] 2 MLJ 616 specifically relied upon by the plaintiff's counsel to persuade this court to intervene and set aside the punishment, it must be pointed out, was a *dissenting opinion*. There too, the learned judge acknowledged the general rule that a court of law cannot question as to whether or not a particular punishment imposed by an administrative authority, in the exercise of its disciplinary function, is appropriate or otherwise and cannot substitute that punishment with another punishment but opined however that under an exception to that rule, the court could still apply the *Wednesbury principle* to assess whether the punishment was one which a reasonable authority could have imposed.

In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525 the Federal Court (in the context of General Orders 1980 (Cap 'D') pertinently further observed as follows:

> ... there is certainly no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced in rank.

[25] *In any event,* I do not think that in this case the second defendant acted arbitrarily or unfairly or took into consideration 'extraneous matters' in coming to his decision to dismiss the plaintiff. No evidence was led on this at all and it must be highlighted here that the second defendant himself was present as witness at the trial to defend his decision and be subjected to cross-examination by the plaintiff's counsel. There has not been shown to my satisfaction any fundamental flaw in the decision making process leading to the punishment meted out to the plaintiff.

NOT CHARGED WITH ANY CRIMINAL OFFENCE

[26] The fact that the plaintiff was not charged of any criminal offence related to the disciplinary charges on which he was found to have breached his condition of services, is also in my finding irrelevant to the issues at hand before this court.

Our Federal Court in the case *Gnanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [2010] 6 MLJ 44 per Richard Malanjun CJ, reminded that in cases of the nature now before this court:

> It should be borne in mind that the procedures prescribed therein are not intended to find the guilt or innocence of an officer charged as in a criminal trial. Further, the finding of guilt in disciplinary action under [GO] should not be equated with the kind of guilt as in any criminal case. Enquiry in disciplinary cases is not and should not take the colour of a criminal trial.

[29] In the Court of Appeal decision in *Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary)) & Ors* [2010] 3 MLJ 753; (unreported) (also a case involving dismissal of a police inspector), Abdul Malik Ishak JCA observed as follows:

> Here, it was not denied that the plaintiff was never charged nor tried nor found guilty by any court of law. The issue of prima facie charges merely relate to 'prima facie' in the disciplinary proceedings and not in a court of law. There was no evidence that the plaintiff was forgiven for his misconduct.

In this same Court of Appeal decision, Low Hop Bing JCA also articulated this point as follows:

> The issue of prima facie charges here is 'prima facie' in the disciplinary proceedings, and so there was no condonation by the defendants.

CONCLUSION

The allegation of the plaintiff that Zamurad (the complainant) had bad motives or that some others in the police force had devised the plaintiff's downfall were irrelevant to the issues at hand. In any event they were bare statements. No other witness (apart from the plaintiff himself) was called by the plaintiff to add any weight to his said statement or claims. The first and second named the defendants were witnesses for the defence and were cross-examined by counsel for the plaintiff. I did not find any violation of the applicable rules for the conduct of the disciplinary action taken against the plaintiff or that any injustice had been occasioned to the plaintiff. Accordingly I dismissed this action with cost.

In the particular circumstances of this case, I ordered that the cost to be paid by the plaintiff to the defendants be fixed at RM7,500 only.

Plaintiffs' action dismissed with costs.

Reported by Kohila Nesan